

DATE SUBMITTED 01-15-09  
 SUBMITTED BY City Manager  
 DATE ACTION REQUIRED 01-21-09

COUNCIL ACTION (x)  
 PUBLIC HEARING REQUIRED ( )  
 RESOLUTION ( )  
 ORDINANCE 1<sup>ST</sup> READING ( )  
 ORDINANCE 2<sup>ND</sup> READING ( )  
 CITY CLERK'S INITIALS ( )

## IMPERIAL CITY COUNCIL AGENDA ITEM

**SUBJECT:** DISCUSSION/ACTION-HUMAN RESOURCES CONTRACT SERVICES.

1. APPROVAL OF CONTRACT FOR HUMAN RESOURCES SERVICES.

**BACKGROUND/SUMMARY:** The Administrative Services Director is currently in charge of utility billings, finance and human resource functions for the City of Imperial. In today's conditions of quickly changing revenue streams and efforts to better monitor expenses, finance issues are taking more time to manage effectively. Concurrently, the utility system has increased changes to accounts due to growth in the City and changing account holders due to the impacts of foreclosures and property transfers. To allow for more time to be focused on these efforts and provide the best level of internal service to City employees and personnel functions, staff requests that the City Council approve the hiring of a part-time contractor to assist with managing human resource functions. The proposed contract attached should allow for AJ Gaddis to assist the City in this area for a period of five months at a compensation of \$4,000 per month. Ms. Gaddis has extensive experience in this area and is available to assist the City in day to day tasks as well as reviewing certain standard and unique functions of our personnel issues to provide recommendations for improving service levels.

**FISCAL IMPACT:** The cost of services would be paid from the City's fund balance. It is possible with this additional attention that certain other accounts such as worker's compensation may decrease in cost to help balance this fiscal impact. Staff will also be able to focus efforts that may avoid costs of duplicating services in utility billings and provide better financial management of city accounts.

**STAFF RECOMMENDATION:**  
 It is recommended that the City Council approve the contract for Human Resource Services.

**MANAGER'S RECOMMENDATION:** **MANAGER'S INITIALS** \_\_\_\_\_  
 The City Manager recommends approval of this item as a step towards providing positive internal and community customer service, as well as increasing the time available to more closely monitor issues during these fiscally challenging times.

**MOTION:**

<b>SECONDED:</b> <b>AYES:</b> <b>NAYES:</b> <b>ABSENT:</b>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%;">APPROVED ( )</td> <td style="width: 50%;">REJECTED ( )</td> </tr> <tr> <td>DISAPPROVED ( )</td> <td>DEFERRED ( )</td> </tr> <tr> <td colspan="2">REFERRED TO:</td> </tr> </table>	APPROVED ( )	REJECTED ( )	DISAPPROVED ( )	DEFERRED ( )	REFERRED TO:	
APPROVED ( )	REJECTED ( )						
DISAPPROVED ( )	DEFERRED ( )						
REFERRED TO:							

**PROFESSIONAL SERVICES CONTRACT**

**1.0 The Parties**

This Contract is made by and between the City of Imperial ("City") and A.J. Gaddis ("Consultant").

**2.0 Paragraph Headings and Definitions**

Paragraph headings in this Contract are for convenience only, and are not to be construed to define, limit, expand, interpret, or amplify the provisions of this Contract. When initially capitalized in this Contract or amendments hereto, the following words or phrases shall have the meanings specified:

- 2.1 Best Efforts - Those efforts which a competent, experienced, and prudent Consultant would use to perform and complete the requirements of this Contract in a timely manner, exercising the degree of care, competence, and prudence customarily imposed on a Consultant performing similar work in the State of California.
- 2.2 Contract - This Contract, including all referenced documents, between City and Consultant for the performance of the Work, and any subsequent written modifications executed by City and Consultant.
- 2.3 Consultant - The person or legal entity which executes this Contract with City to perform the Work.
- 2.4.1 Imperial Contract Manager - The title of the person designated by City to be its representative with authority to act for City regarding this Contract and the Work of Consultant.
- 2.5.1. Work - All or a part or phase of the obligations undertaken by Consultant pursuant to the Contract.

**3.0 Scope of Work**

- 3.1 General Scope of Work – City hereby retains and engages Consultant, and Consultant accepts such engagement, to perform the services including, but not limited to, the following: managing day to day operations for personnel services as directed by the City Manager or her designee; providing recommendations as to the organization of the human resources function for City on a going forward basis, including, for example, hiring methods and procedures, training, benefit plans and retirement programs; review of current operations of City for the purpose of assessing and recommending programs and processes in the area of human resources.

4.0. **Term**

The term of this agreement shall commence February 1, 2009, and terminate June 30, 2009, unless terminated as provided herein.

5.0. **Manner of Compensation**

City shall compensate Consultant for Work performed the sum of \$4000.00 per month.

6.0 **Payment**

City shall pay Consultant for Services rendered by Consultant hereunder on the basis of monthly invoices for the period ending on the final day of the month. City shall pay each invoice within 30 days after receipt. Invoices shall include a description, date of services and invoice date. All invoices shall be sent to City of Imperial, Attention: Laura Gutierrez. City shall advise Consultant of any dispute within 10 days of receipt of the invoice and may withhold payment as to the disputed portion pending resolution of such dispute.

7.0 **Ownership of Documents**

All documents and data collected or prepared in the course of performing the Services, shall become the property of City.

## **8.0 Duties of Consultant**

- 8.1 Degree of Care - In the performance of its services hereunder, Consultant shall exercise that degree of skill and judgment commensurate with that which is normally exercised by recognized professional consultants in the same discipline, with respect to services of a similar nature, in accordance with all applicable rules, laws and regulations.
- 8.2 Correction of Improper Services - Consultant will re-perform or correct any portion of Work not performed in accordance with the above standard, provided that Consultant is notified in writing of the nonconformity within 90 days after discovery by City of the nonconforming service. Consultant will perform the remedial service at its own cost.
- 8.3 Licenses - Consultant represents and warrants to City that it has all licenses, permits, qualifications, insurance and approvals of whatsoever nature which are legally required of Consultant to practice its profession. Consultant represents and warrants to City that consultant shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Contract, any licenses, permits, insurance and approvals which are legally required of Consultant to practice its profession.

## **9.0 Suspension**

City may, upon 10 calendar day's written notice, direct Consultant to suspend performance on any or all of the services under the Contract for a specified period of time. Upon receipt of a suspension notice, Consultant shall discontinue the Work under the Contract. Services under the Contract shall be resumed by Consultant after such suspension on 10 calendar days written notice from City.

## **10.0 Termination**

Under the terms hereunder, City may, at any time and for any reason, terminate this Contract upon not less than 7 days written notice to Consultant. Under such circumstances, this Contract and shall terminate on the date set forth in such written notice. The parties shall meet and confer concerning completion of work in progress.

- 10.1 Termination For Cause - If Consultant shall fail to diligently, timely and expeditiously perform any of its respective obligations under this Contract, and



such failure shall have continued for 10 days after City has delivered written notice thereof to Consultant; or Consultant shall make a general assignment for the benefit of its creditors, a receiver or trustee shall have been appointed on account of Consultant's insolvency, Consultant otherwise shall be or become insolvent, or an order for relief shall have been entered against Consultant under Chapter 7 or Chapter 11 of Title 11 of the United States Code; or Consultant otherwise shall be in default under the Contract and such default shall not have been cured within 10 days after City has delivered written notice to Consultant; then, City, upon 7 days' prior written notice to Consultant, immediately may terminate this Contract for cause.

- 10.1.1        Upon termination of this Contract for cause, Consultant shall be entitled only to payment of that portion of services performed for which Consultant has not been paid and which Consultant has actually satisfactorily performed, up to the date of such termination; provided, however, that:
- 10.1.2        Nothing contained in this Contract shall limit in any manner any rights or remedies otherwise available to City by reason of a default by Consultant under this Contract including, without limitation, the right to seek full reimbursement from Consultant for all costs and expenses incurred or to be incurred by City by reason of Consultant's default hereunder and which City would not have otherwise incurred if Consultant had not defaulted hereunder.
- 10.2        Termination for Convenience – City may terminate this Contract without cause upon the giving of 10 days written notice. In the event that City terminates this Contract for convenience, Consultant shall be entitled to payment for services performed which have not been paid to Consultant and which shall compensate Consultant for all services actually and satisfactorily performed by Consultant up to the date of such termination.
- 10.3        Termination For Nonpayment - If payment is not received by Consultant within 30 days from the date it is due and payable hereunder, Consultant shall have the right, upon not less than 10 days written notice to City, to terminate this Contract. Consultant shall be entitled to compensation for all services performed satisfactorily under the Contract. If within the 10 day period City effects payment, the notice of termination shall have no further force or effect and Consultant shall continue to perform the services hereunder as if the notice of intention to terminate had not been given.

10.4 Duties of Consultant Upon Termination - Upon any termination of this Contract Consultant shall:

10.4.1 Discontinue all of its services under the Contract from and after the date of the notice of termination, except as may be required to complete any item or portion of services to a point where discontinuance will not cause unnecessary waste or duplicative work or cost, for which services, Consultant, if it has terminated this Contract for nonpayment, shall be compensated in the manner and to the extent that Consultant otherwise would have been compensated under the terms of this Contract.

10.4.2 Transfer to City in the manner, to the extent, and at the time directed by City, all supplies, materials and other property produced as a part of, or acquired in the performance of Consultant's services.

10.4.3 Take such other actions as City may reasonably direct.

11.0 **Indemnification**

Consultant and City shall both indemnify each other in proportion to their comparative fault as established under California law.

12.0 **Relationship of Parties**

Consultant shall, for all purposes, be an independent contractor as to City and under no circumstances shall the relationship of employer and employee arise between the agents or employees of Consultant and City.

13.0 **Assignment and Subcontracting**

13.1 Non-Assignment - A substantial inducement to City for entering into this Contract is the professional reputation, experience and competence of Consultant. Assignments of any or all rights, duties or obligations of the Consultant under this Contract will be permitted only with the express consent of the City. Consultant shall not subcontract any portion of the work to be performed under this Contract without the written authorization of City. If City consents to such subcontract, Consultant shall be fully responsible to City for all acts or omissions of the subcontractor. Nothing in this Contract shall create any contractual relationship between City and subcontractor nor shall it create any obligation on the part of

the City to pay or to see to the payment of any monies due to any such subcontractor other than as otherwise is required by law.

- 13.2 **Successors and Assigns** - This Contract shall be binding upon the successors and assigns of each of the parties hereto in respect to all of the provisions hereof. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of any of the parties, nor shall it be construed as giving any rights or benefits hereunder to anyone other than the parties to this Contract.

#### 14.0 **Laws and Regulations**

Consultant will comply in the performance of the Contract with all laws and regulations applicable to Consultant in its performance of the Contract.

#### 15.0 **Attorneys' Fees**

If either party to this Contract shall bring any action, claim, appeal, or alternative dispute resolution proceedings, for any relief against the other, declaratory or otherwise, to enforce the terms of or to declare rights under this Contract (collectively, an Action), the losing party shall pay to the prevailing party a reasonable sum for attorneys' fees and costs incurred in bringing and prosecuting such Action and/or enforcing any judgment, order, ruling, or award (collectively, a Decision) granted therein. Any Decision entered in such Action shall provide for the recovery of attorneys' fees and costs incurred in enforcing such Decision. The court or arbitrator may fix the amount of reasonable attorneys' fees and costs on the request of either party. For the purposes of this paragraph, attorneys' fees shall include, without limitation, fees incurred in the following: (1) post-judgment motions and collection actions; (2) contempt proceedings; (3) garnishment, levy, and debtor and third party examinations; (4) discovery; and (5) bankruptcy litigation. "Prevailing party" within the meaning of this paragraph includes, without limitation, a party who agrees to dismiss an Action on the other party's payment of the sums allegedly due or performance of the covenants allegedly breached, or who obtains substantially the relief it seeks.

#### 16.0 **Governing Law and Venue**

This Contract shall be interpreted in accordance with the substantive and procedural laws of the State of California. All actions or proceedings arising in connection with this Contract shall be tried and litigated exclusively in State court

located in the County of Imperial, State of California and Federal court located in the County of San Diego, State of California. The aforementioned choice of venue is mandatory, thereby precluding the possibility of litigation between the parties with respect to or arising out of this Contract in any jurisdiction other than that specified in this paragraph. Each party hereby waives any right it may have to assert the doctrine of forum non conveniens or a similar doctrine or to object to venue with respect to any proceeding brought in accordance with this paragraph, and stipulates that the State and Federal courts located in the Counties of Imperial and San Diego, respectively, California, shall have in personam jurisdiction and venue over each of them for the purpose of litigating any dispute or proceeding arising out of or related to this Contract. Each party hereby authorizes service of process sufficient for personal jurisdiction in any action against it at the address and in the manner for the giving of notice as set forth in this Contract.

**17.0 Integration**

This Contract and any exhibits hereto, as well as other documents referred to in this Contract, constitute the entire Contract between the parties with regard to the subject matter hereof and thereof. This Contract supersedes all previous Contracts between or among the parties. There are no Contracts, representations, or warranties between or among the parties other than those set forth in this Contract.

**18.0 Authorized Representatives and Notices**

**18.1 Representatives** - Prior to commencement of the work under the Contract, City and Consultant shall each designate a representative authorized to act in behalf of each party and shall advise the other party in writing of the name, address and telephone number of such designated representative and shall inform the other party of any subsequent change in such designation.

**18.2 Notice and Communications** - All communications relating to the day to day activities under this Contract shall be exchanged between the representatives of City and Consultant. All legal notices and communications required under or related to this Contract shall be in writing, and shall be delivered personally or mailed by certified mail, postage prepaid, return receipt requested, to the representatives of City and Consultant identified below. Notice shall be effective on the date of delivery.

**TO:** City of Imperial  
420 Imperial Avenue  
Imperial, California 92251  
Attn: \_\_\_\_\_

Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

**TO:** A.J. Gaddis

Attn: \_\_\_\_\_

Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

- 18.3 A party may change or supplement the information exchanged concerning authorized representatives and notices by giving the other party written notice of the new information in the manner set forth above.

**19.0 Waiver**

The failure of City to insist upon strict performance of any of the terms and conditions of this Contract, or to exercise or delay the exercise of any rights or remedies provided by this Contract or by law, or the acceptance of work or payment for work shall not release Consultant from any of the responsibilities or obligations imposed by law or by this Contract and shall not be deemed a waiver of any right of City to insist upon strict performance of this Contract. None of the provisions of the Contract shall be considered waived by either party except when such waivers are agreed upon in writing by the parties.

**20.0 Survival of Obligations and Liabilities**

The termination, cancellation, or acceptance of the work under the Contract shall not relieve Consultant of its obligations for work completed prior to the effective date of such termination, cancellation, or acceptance, nor shall it relieve Consultant of its liabilities at law or under this Contract.

**21.0 Severability**

If any provision of this Contract or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remainder of this Contract shall not be affected thereby, and each such provision shall be valid and enforceable to the fullest extent permitted by law. However, if either party in good faith determines that the finding of illegality or unenforceability adversely affects the material consideration for its performance

under this Contract such party may, by giving written notice to the other party, terminate this Contract.

**22.0 Execution and Effective Date.**

This Contract has been executed by the duly authorized officers of the parties and shall be effective as of the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

**CITY OF IMPERIAL**

**CONSULTANT**

By \_\_\_\_\_

By \_\_\_\_\_

**Attest:**

By \_\_\_\_\_

DATE SUBMITTED 01/15/09  
 SUBMITTED BY PLANNING  
 DATE ACTION REQUIRED 01/21/09

COUNCIL ACTION ( )  
 PUBLIC HEARING REQUIRED ( )  
 RESOLUTION ( )  
 ORDINANCE 1<sup>ST</sup> READING ( )  
 ORDINANCE 2<sup>ND</sup> READING ( )  
 CITY CLERK'S INITIALS ( )

## IMPERIAL CITY COUNCIL AGENDA ITEM

<b>SUBJECT: DISCUSSION/ACTION: DEVELOPMENT AND DISPOSITION AGREEMENT FOR IMPERIAL VICTORIA APARTMENTS</b>	
<p>1. Approval of Development and Disposition Agreement #2009.1 for Imperial Victoria Apartments</p>	
DEPARTMENT INVOLVED:	REDEVELOPMENT

<b>BACKGROUND/SUMMARY:</b> The Agency Board previously approved RDA Housing Assistance for the creation of an 81-unit multifamily residential apartment complex at the southwest corner of Aten and Legakes. The Developer's HOME funding application was not approved. The Developer still wishes to continue with the project, and the Agency has a need to provide affordable housing within the project area. The Development and Disposition Agreement (DDA) would require the Agency to acquire the project site from its current owner and at a point in time when the Developer has obtained sufficient funding, the Agency would convey ownership to the Developer. The DDA provides a time limit of August 2010 for the Developer to obtain funding.	
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FISCAL IMPACT:	F.O. INITIALS _____
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<b>STAFF RECOMMENDATION:</b>  Staff recommends approval of the Development and Disposition Agreement and authorize the Executive Director to begin acquisition proceedings.	
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MANAGER'S RECOMMENDATION:	MANAGER'S INITIALS _____
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<b>MOTION:</b>			
SECONDED: AYES: NAYES: ABSENT:	APPROVED ( ) DISAPPROVED ( )  REFERRED TO:	REJECTED ( ) DEFERRED ( )	

**CITY OF IMPERIAL  
REDEVELOPMENT AGENCY**

**DEVELOPMENT AND DISPOSITION AGREEMENT  
#OPA2009.01**

**IMPERIAL VICTORIA APARTMENTS**

This agreement is hereby entered into this 21<sup>st</sup> day of January 2009 by and between the Imperial Redevelopment Agency, hereinafter referred to as "Agency" and CIC Imperial Victoria, L.P., a California limited partnership hereinafter referred to as "Developer. The Agency and Developer hereby agree as follows:

WITNESSETH

Whereas, in furtherance of the objectives of California Community Redevelopment Law, the Agency desires to cooperate with the Developer in providing affordable housing opportunities by developing the southwest corner of Aten Boulevard and Legakes Avenue with an 81-unit apartment complex; and

Whereas, under California Redevelopment Law, the Agency can enter into public/private agreements to remove blight, improve community appearance, prevent continuing declines in property values, rehabilitate and restore existing commercial revenue generating properties, construct new projects, revitalize economically depressed areas through new investment, and provide housing opportunities that are affordable for low to moderate income households within the Imperial Redevelopment Project Area; and

Whereas, it is in the interests of the Agency to participate with the Developer in this project, to effectively implement the Redevelopment Plan for the Imperial Redevelopment Project Area.

**Section 1. Purpose of the Agreement**

The purpose of this Agreement is to implement the Redevelopment Plan for the Imperial Redevelopment Project Area by providing an incentive for the developer to invest new funds within the Project Area through the development of an affordable, multifamily residential project at the project site by the Developer pursuant to this agreement, and the fulfillment generally of the agreement are in the vital and best interests of the Imperial Redevelopment Agency, and the health, safety, and general welfare of the City of Imperial residents, and in accord with the public purposes and provisions of applicable Federal, State and local laws and requirements under which the project will be undertaken and assisted.

**Section 2. The Redevelopment Plan**

The Redevelopment Plan for the Project Area was approved by the City Council of the City of Imperial by Ordinance No. 659, which was adopted on June 19, 2002. This Agreement shall be subject to the provisions of the Redevelopment Agency which is incorporated herein and made a part this Agreement.



### **Section 3. The Redevelopment Project Area**

The Redevelopment Project Area is located in the City of Imperial, California, the exact boundaries of which are specifically described in the Redevelopment Plan and in an instrument recorded in Book 2131 at page 1726, in the Official Records of the Imperial County Recorder, which instruments are incorporated herein by reference and made a part hereof.

### **Section 4. The Project Site**

The project site to which this Agreement relates is that portion of the Redevelopment Project Area legally described as Lot D, Victoria Ranch Subdivision Unit No.2A in the City of Imperial, County of Imperial. The Assessor's Parcel Number is 044-220-083.

### **Section 5. Parties to the Agreement**

The parties to this Agreement are the Redevelopment Agency of the City of Imperial and CIC Imperial Victoria, L.P., a California limited partnership. The Agency is a public body, corporate and politic, exercising governmental functions and powers, and organized and existing under Chapter 2 of the Community Redevelopment Law of the State of California. The principal office of the Agency is located at 420 South Imperial Avenue, Imperial, California 92251. "Agency", as used in this Agreement, includes the Imperial Redevelopment Agency and any assignee of, or successor to its rights, powers and responsibilities.

The Developer is herein identified as CIC Imperial Victoria, L.P., a California limited partnership. The principal mailing address of the Developer is 5993 Avenida Encinas, Suite 101, Carlsbad, CA 92008. Whenever the term "Developer" is used herein, such term shall include any approved nominee, assignee, or successors in interest of the Developer.

### **Section 6. Prohibition Against Changes in Ownership, Management, and Control**

The qualifications and identity of the Developer are of particular concern to the City and the Agency. It is because of those qualifications and identity that the Agency has entered into this Agreement with the Developer. No voluntary or involuntary successor in interest of the Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein.

Except as set forth herein, the Developer shall not, prior to January 1, 2017, assign all or any part of this Agreement or any rights hereunder, without the prior written approval of the Agency. The Agency shall not unreasonably withhold its approval of an assignment provided that: (1) the assignee shall expressly assume the obligations of the Developer pursuant to this Agreement in writing satisfactory to the Agency; (2) the original Developer shall remain fully responsible and liable for the performance of the obligations of the Developer pursuant to this Agreement until the fifth (5<sup>th</sup>) anniversary of the recording of the Notice of Completion for the project, and (3) the assignee is fully capable of performing the duties and discharging the obligation it is assuming.

The Developer shall notify the Agency in writing in five (5) days of any and all changes whatsoever in its identity, business organization, or business location.

All of the terms, covenants, and conditions of this Agreement shall be binding upon and shall inure to the benefit of the Developer and the permitted successors and assigns of the Developer.

## **Section 7. Representations by the Developer**

The Developer represents and warrants to the Agency as follows:

1. The Developer is a legally established business and in good standing under the laws of the State of California, and has duly authorized, executed and delivered this Agreement and any and all other documents required to be executed and delivered by the Developer, in order to carry out, give effect to, and consummate the transactions contemplated by this Agreement.
2. The Developer does not have any material contingent obligations or any material contractual agreements which could materially affect the ability of the Developer to carry out its obligations hereunder.
3. To the Developer's knowledge, there is no action or proceeding pending or threatened, looking toward the dissolution or liquidation of the Developer, nor to the Developer's knowledge is there any action or proceeding pending or threatened by or against the Developer which could affect the validity and enforceability of the terms of this Agreement in any material respect, or that would materially and adversely affect the ability of the Developer to carry out its obligations hereunder.
4. The Developer is not subject of a current or threatened bankruptcy proceeding.

Each of the foregoing items 1 to 4 inclusive, shall be deemed to be an on-going representation and warranty. The Developer shall use reasonable efforts to advise the Agency in writing if there is any material change pertaining to any matters set forth or referenced in the foregoing items 1 to 4 inclusive.

## **Section 8. Acquisition and Conveyance of the Site**

The project site is currently owned by parties other than the Agency and Developer. Agency shall acquire the project site through a separate purchase agreement with the property owner. Developer acknowledges that the Agency is required to comply with the California Community Redevelopment Law (Section 33000 et seq. of the California Health and Safety Code) with regards to the purchase price and the process by which the property is acquired. This Agreement shall in no way require the Agency to exercise its eminent domain authority in acquiring the project site.

Prior to the conveyance of the project site from the Agency to the Developer, the Developer shall have acquired all necessary financing and land use approvals to complete the improvements to the project site. The Developer shall also execute an Affordability Covenant restricting the project as an affordable housing project.

## **Section 9. Physical and Environmental Condition of the Site**

Except as otherwise set forth in this Agreement, the Site shall be conveyed to the Developer in an "as is" physical and environmental condition, with no warranty, express or implied, by the Agency as to the condition of any existing improvements on the Site, the soil, its geology, the presence of known or unknown faults or Hazardous Materials or toxic substances, and it shall be the sole responsibility of the Developer at its expense to investigate and determine the physical and environmental conditions for the Improvements to be constructed and the proposed use of same.

The Agency shall assign to the Developer any indemnification which it obtains in connection with the Agency's acquisition of the Third Party Parcel with respect to the presence of Hazardous Materials on and under such Third Party Parcel, with such assignment to become effective at the Closing.

## **Section 10. Improvement of the Project Site**

Subject to all of the other terms and conditions set forth in this Agreement, the Developer shall develop or cause the development of an 81-unit affordable multi-family residential apartment complex and all other necessary on-site and off-site improvements. In the event that off-site improvements are completed by other parties, the Developer shall be responsible for any applicable fair-share fees.

The Developer shall ensure that the general contractor completing the work is duly licensed and bonded in the State of California, and that the contractor has a current City of Imperial business license, appropriate liability insurance, and the minimum amount of State required workers compensation insurance.

## **Section 11. Affordable Housing**

All units developed on the project site shall be available to, occupied by, or held vacant for occupancy only by occupants who are persons or families of low or moderate income pursuant to California Health and Safety Code Section 50093. Rents charged to tenants shall meet the definition of "affordable rent" set forth in Health and Safety Code Section 50053(b)(3). All units shall remain affordable for a period of fifty-five (55) years commencing from the date that the City issues its last Certificate of Occupancy for the Project. Developer shall not transfer or encumber any of the Property or permit the conveyance, transfer, or encumbrance of the Property unless such assignee, transferee or encumbrancee has agreed, in writing and in a form suitable for recordation, to be bound by the terms of this Agreement.

## **Section 12. Planning and Zoning Approvals**

The Developer shall comply with all requirements of the City of Imperial General Plan and Zoning Ordinance. In addition, the Developer shall comply with all other applicable City Ordinances and regulations as it relates to the project site. Nothing in this Agreement allows for any implied variance or waiver from any City Ordinance or regulation. If

planning approval to develop the site as outlined in Section 10 cannot be obtained, then this Agreement shall automatically terminate and shall be of no further effect.

### **Section 13. Compliance with Uniform Building Code**

All construction undertaken on the project site shall be undertaken in full compliance with all applicable provisions of the Uniform Building Code. A building permit shall be obtained prior to the start of any construction on the site.

### **Section 14. Schedule for Performance**

The Agency shall acquire the project site from its current owner(s) within ninety (90) days of the execution of this Agreement. The Developer shall have obtain all necessary financing and land use approvals prior to August 31, 2010. Conveyance of Title shall occur within sixty (60) days of the Developer providing reasonable evidence that the Developer has obtained sufficient financing necessary to undertake the development of the project site.

The schedule of performance may be revised where conditions or events beyond the control of the developer occur. Such events include acts of God such as accidental fire, earthquake, severe weather, or flood. In addition, legitimate delays in completion of the project due to labor strikes, material shortage, or unforeseen site conditions may also justify a revision of the schedule of performance. Any revision of the schedule for performance must be approved in writing by the Agency Executive Director, upon written request of the Developer.

### **Section 15. Cost of Construction and Site Development**

The cost of all improvements shall be borne exclusively by the Developer.

### **Section 16. Agency Approval of Plans and Drawings**

The Agency shall have approval authority for all plans and drawings prepared for rehabilitation of the project site. This includes building plans, site development plans, landscaping plans, and building architectural elevations, including exterior colors and façade materials. The Agency shall review all plans within 30 calendar days, and provide comments to the Developer.

### **Section 17. Participation in the Project by the Agency**

Conveyance of the project site shall constitute the Agency's entire participation in the project. This Agreement shall not require the Agency in any form of monetary participation.

### **Section 18. Prevailing Wage and Public Works Requirements**

The Developer shall carry out the construction of the Improvements and the development of the Site in conformity with all applicable federal and state labor laws. If applicable, Developer and its contractors and subcontractors shall pay prevailing wages and employ apprentices in compliance with Health and Safety Code Sections 33423 through 33426, and Labor Code Section 1770, et seq., and shall be responsible for the

keeping of all records required pursuant to Labor Code Section 1776, complying with the maximum hours requirements of Labor Code Sections 1810 through 1815, and complying with all regulations and statutory requirements pertaining thereto. Upon the request of the Agency, the Developer shall certify to the Agency that it is in compliance with the requirements of this Section.

Developer hereby agrees that Developer shall have the obligation to provide any and all disclosures or identifications required by Labor Code Section 1781, as the same may be amended from time to time, or any other similar law.

Developer shall indemnify, protect, defend and hold harmless the Agency, City and their respective officers, employees, contractors and agents, with counsel reasonably acceptable to Agency and City, from and against any and all loss, liability, damage, claim, cost, expense and/or "increased costs" (including reasonable attorneys' fees, court and litigation costs, and fees of expert witnesses) which, in connection with the development, or construction (as defined by applicable law) of the Improvements, including, without limitation, any and all public works (as defined by applicable law), results or arises in any way from any of the following:

(1) the noncompliance by Developer of any applicable local, state and/or federal law, including, without limitation, any applicable federal and/or state labor laws (including, without limitation, if applicable, the requirement to pay state prevailing wages and hire apprentices);

(2) the implementation of Section 1781 of the Labor Code, as the same may be amended from time to time, or any other similar law; and/or (3) failure by Developer to provide any required disclosure or identification as required by Labor Code Section 1781, as the same may be amended from time to time, or any other similar law. It is agreed by the parties that, in connection with the development and construction (as defined by applicable law) of the Improvements, including, without limitation, any and all public works (as defined by applicable law), Developer shall bear all risks of payment or non-payment of prevailing wages under California law and/or the implementation of Labor Code Section 1781, as the same may be amended from time to time, and/or any other similar law. "Increased costs," as used in this Section 309.3, shall have the meaning ascribed to it in Labor Code Section 1781, as the same may be amended from time to time. The foregoing indemnity shall survive termination of this Agreement and shall continue after completion of the construction and development of the Improvements by the Developer.

#### **Section 19. Bodily Injury and Property Damage Insurance**

The Developer shall take out and maintain a comprehensive liability insurance policy in the amount of one million dollars (\$1,000,000.00) combined single limit policy, including contractual liability, which shall protect the Developer, the City and the Agency from any and all claims for such damages. The Developer shall provide a certificate of insurance countersigned by an authorized representative of the insurance company on a form of the insurance company setting forth the general provisions of the insurance. The City, the Agency and The Holt Group, Inc. shall be named as additional insureds under the policy. The insurance certificate shall contain a statement of obligation on the part of the insurance company to notify the City and Agency of any material change, cancellation, or termination of coverage at least 30 days prior to the effective date of such material

change in coverage, cancellation, or termination. The Developer shall also furnish to the Agency, or cause to be furnished by the contractor, evidence satisfactory to the Agency that the contractor has in place valid workers compensation insurance as required by State Law.

The insurance obligations outlined in this section shall remain in place at all times during construction of the project and for 45 days following the recording of a Certificate of Occupancy and Notice of Completion for the project.

## **Section 20. Destruction and Restoration**

The Developer covenants and agrees that in case of damage or destruction of the project, project site improvements, on-site building or other improvements, fixtures, and other alterations prior to January 1, 2019, the Developer shall rebuild and restore, repair or replace the project site, on-site improvements, buildings, fixtures and other alterations to the approximate condition of the improvements and building immediately prior to the natural or manmade, accidental or intentional event causing the damage or destruction.

The Developer shall take out and maintain a replacement cost "all-risk" insurance policy in an amount sufficient to rebuild and restore, repair or replace the project improvements, buildings and other improvements, fixtures and alterations located thereon, including upgrades and modifications required by changes in laws or building codes until January 2019. The Developer shall provide a Certificate of Insurance countersigned by an authorized representative of the insurance company on a form of the insurance company setting forth the general provisions of the insurance. The City and the Agency shall be named as additional insureds under the policy. The insurance certificate shall contain a statement of obligation on the part of the insurance company to notify the City and the Agency of any material change, cancellation or termination of coverage at least 30 days prior to the effective date of such material change in coverage, cancellation or termination.

## **Section 21. Maintenance of the Project Site**

The Developer shall maintain the project site and the improvements on the site in good condition at all times. The Developer shall ensure that the site is kept free of weeds, debris and waste material at all times. The Developer shall also maintain the landscaping required to be planted in a healthy condition at all times and shall replace any required trees, shrubs, and turf that dies or becomes unhealthy within 30 days. If, at any time, the Developer fails to properly maintain said landscaping and/or fails to replace dead or damaged landscaping within the 30 day period, the Agency, after giving the Developer a written 10 day notice, shall have the right to replace said damaged landscaping at Agency expense and place a lien on the property to recover Agency costs.

## **Section 22. Anti-Discrimination During Construction**

The Developer for itself and its successors and assigns agrees that in the construction of the improvements contemplated by this agreement on the site, the Developer will not discriminate, nor allow any discrimination by any contractor or subcontractor, against any employee or job applicant because of sex, age, handicap, color, religion, creed, national origin, marital status, or sexual orientation.

### **Section 23. Applicable Local, State and Federal Laws**

The Developer shall carry out the project in full compliance with all applicable Federal, State and Local laws, including those relating to labor standards, payment of minimum wages, hours of work and drug free workplace. Before commencement of any construction on the site, the Developer shall pay or cause to be paid to the City and other agencies, applicable building permit fees, school impact fees, and water and sewer connection fees.

### **Section 24. Rights of Access**

Representatives of the Agency and the City shall have reasonable right of access to the site without charges or fees during the period of construction to determine compliance with the provisions of this Agreement. Such representatives of the Agency and the City shall be those so identified by the executive director of the Agency.

### **Section 25. Indemnification**

The Developer shall indemnify and hold harmless the Agency, the City and its officers, employees, agents, consultants and attorneys from any and all actions, causes of action, claims, demands, costs, attorney's fees, loss of services, expenses, and compensation on account of, or in any way growing out of the developer's performance or non-performance of any section, covenant, or term of this Agreement.

### **Section 26. Defaults and Remedies**

Subject to the extension of time for force majeure set forth in Section 12, failure or delay by the Agency or Developer to perform any term or provision of this Agreement constitutes a default under this Agreement. The party who so fails or delays must immediately commence to cure, correct or remedy such failure or delay, and shall complete such cure, correction or remedy with reasonable diligence.

The injured party shall give written notice of the default to the party in default, specifying the default complained of by the injured party. Except as required to protect against further damages, the injured party may not institute legal proceedings against the party in default until 30 days have elapsed after giving such notice. Delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default. Except as expressly provided for in this Agreement, any failure or delay by either party in asserting any of its rights or remedies as to any default, shall not operate as a waiver of any default or of any such rights or remedies as to any default, or deprive either party of its right to institute and maintain any actions or proceeding which it may deem necessary to protect, assert or enforce any such rights or remedies.

Notwithstanding any provision herein to the contrary, the rights and remedies of the Agency hereunder shall be subject to the rights and remedies of the Developer's lender to cure any default on the part of the Developer, as well as the other rights of such lender, so long as those rights are in conformance with and meet the intent of this Agreement and those rights are exercised in a timely and diligent manner.

## **Section 27. Applicable Laws**

This Agreement shall be construed and governed by the laws of the State of California.

## **Section 28. Commencement of Legal Actions**

In addition to any other rights or remedies, either party may institute legal action to cure, correct, or remedy any default to recover damages for any default, or to obtain any other remedy consistent with the purposes of this Agreement. Such legal actions shall be instituted in the Superior Court of the County of Imperial, State of California, or in any other appropriate court in the County of Imperial.

In any legal action commenced between the parties hereto concerning the project site, this Agreement, or the rights and duties of either party in relation thereto, the prevailing party in such legal action shall be entitled, in addition to such other relief as may be granted, to recover reasonable attorney's fees and court costs and other non-reimbursable legal expenses, such as expert witness testimony fees.

## **Section 29. Termination by the Developer**

In the event that the Developer is unable to proceed with the project according to the schedule of performance outlined herein, the Developer may request the termination of this Agreement. The Developer shall provide the Agency with written notice outlining the reasons for the requested termination. The Agency, at its own discretion, may choose to terminate this Agreement or enforce the Agreement.

## **Section 30. Termination by the Agency**

The Agency, subject to the notice provisions of Section 21, may terminate this Agreement by giving formal written notice to the Developer, if any of the following events occur:

1. The Developer, or any successor in interest, assigns or attempts to assign this Agreement or any rights therein, to a third party without Agency approval in violation of this Agreement.
2. There is significant change in the financial stability of the Developer as evidenced by the Developer filing for bankruptcy.
3. The Developer fails to construct the project within the approved time or any extension thereof.
4. The Developer fails to comply with any provision of this Agreement or any approved amendments thereto.

## **Section 31. Acceptance of Service Process**

In the event that any legal action is commenced by the Developer against the Agency, service of process on the Agency shall be made by personal service on the Chairman or Executive Director of the Agency, or in such other manner as may be provided by law.

In the event any legal action is commenced by the Agency against the Developer, service of process shall be made personally to the Developer.



### **Section 32. Written Notices**

Any written notices required by or under this Agreement shall be addressed as follows, and sent by first class mail, postage prepaid:

To the Agency: Ms. Marlene D. Best, Executive Director  
Imperial Redevelopment Agency  
420 South Imperial Avenue  
Imperial, CA 92251

To the Developer: James Schmid  
CIC Imperial Victoria, L.P.,  
5993 Avenida Encinas, Ste. 101  
Carlsbad, CA 92008

### **Section 33. Warranty Against Payment of Consideration for Agreement**

The Developer warrants that it has not paid or given, and will not pay or give any third party any monetary consideration for obtaining this Agreement or any benefits or rights outlined therein.

### **Section 34. Non-Liability of Agency Officials and Employees**

No member of the Agency Board, official, employee, consultant, or independent contractor of the Agency or the City shall be personally liable to the Developer or any successor in interest, in the event of a default or breach by the Agency, or for any amount which may become due to the Developer or to its successors, or on any obligations under the terms of this Agreement.

### **Section 35. Inspection of Books and Records**

The Agency staff shall have the right at all reasonable times to inspect the books and records of the Developer pertaining to the project and the project site, as pertinent to the purposes of this Agreement until January 1, 2017. The Developer has the right at all reasonable times to inspect the public records, as provided for by or under California law, of the Agency pertaining to the site, as pertinent to the purposes of this Agreement.

### **Section 36. Agreement to Run with the Land**

The terms, covenants, conditions and restriction of this Agreement shall extend to, and shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns each of the Developer and the Agency.

All of the terms, covenants, conditions and restrictions of this Agreement which do not terminate upon the recording of the Certificate of Completion for the site shall be deemed to be, and shall constitute terms, covenants, conditions, and restrictions running with the land unless otherwise specified. This Agreement shall be binding on any future owners or successors in interest of the project site, and all terms and requirements of this Agreement shall run with the land. This Agreement shall be recorded in the Office of the County Recorder of Imperial County, California.

### **Section 37. Amendments to Agreement**

The Developer and the Agency agree to mutually consider reasonable requests for amendments to this Agreement which may be made by lending institutions, the Agency's or Developer's counsel, or financial consultants, provided said requests are consistent with the intent of this Agreement, and would not substantially alter the basic terms included herein.

### **Section 38. Invalidity of Terms**

It is hereby declared to be the intention of the parties that the sections, paragraphs, sentences, clauses and phrases of this Agreement are severable, and if any phrase, clause, sentence, paragraph or section of this Agreement shall be declared unconstitutional, invalid or unenforceable by a judgment or decree of a court of competent jurisdiction, such unconstitutionality, invalidity, or unenforceability shall not affect any of the remaining clauses, sentences, paragraphs or sections of this Agreement or any approved amendments thereto.

### **Section 39. Entire Agreement, Waivers, and Amendments**

This Agreement shall be executed in three duplicate originals, each of which is deemed to be an original. This Agreement includes ten (10) pages and attachments which constitutes the entire Agreement and understanding of the parties.

This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to any or all part of the site.

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the Agency and Developer, and all amendments hereto must be in writing and signed by the appropriate authorities of the Developer and Agency.

### **Section 40. Time for Acceptance of Agreement by the Agency**

This Agreement, when executed by the Developer to the Agency must be authorized, executed and delivered by the Agency within 30 days after the date of signature by the Developer or this Agreement may be terminated by the Developer upon written notice to the Agency. The date of this agreement shall be the date when the Agreement shall have been signed by the authorized Agency representative.

*(the remainder of this page is intentionally left blank)*

**Section 41. Approval Signatures**

The signatures of the Developer and the Agency outlined below constitute the execution of this Agreement.

IMPERIAL REDEVELOPMENT AGENCY

By:

Date: \_\_\_\_\_

\_\_\_\_\_  
Marlene D. Best, Executive Director

Attest:

Form Approved by Agency Counsel

\_\_\_\_\_  
Debra Jackson  
Recording Secretary

\_\_\_\_\_  
Dennis Morita  
Attorney at Law

Date: \_\_\_\_\_

Date: \_\_\_\_\_

DEVELOPER  
CIC Imperial Victoria, L.P.,  
a California limited partnership

By: CIC Imperial Victoria, LLC,  
a California limited liability company

By:

\_\_\_\_\_  
James Schmid  
Manager

Date: \_\_\_\_\_

DATE SUBMITTED 01/15/09  
 SUBMITTED BY PLANNING  
 DATE ACTION REQUIRED 01/21/09

COUNCIL ACTION ( )  
 PUBLIC HEARING REQUIRED ( )  
 RESOLUTION ( )  
 ORDINANCE 1<sup>ST</sup> READING ( )  
 ORDINANCE 2<sup>ND</sup> READING ( )  
 CITY CLERK'S INITIALS ( )

## IMPERIAL CITY COUNCIL AGENDA ITEM

**SUBJECT: DISCUSSION/ACTION: DEVELOPMENT AND DISPOSITION  
AGREEMENT WITH HOFER CORPORATION**

2. Approval of Development and Disposition Agreement #2009.2 with the Hofer Corporation

DEPARTMENT INVOLVED: REDEVELOPMENT

**BACKGROUND/SUMMARY:**

The City Council and Agency Board previously approved a number of action leading to the conveyance of real property located north of the wastewater treatment plant. This Development and Disposition Agreement (DDA) outlines the responsibilities of the Developer with regards to the project site.

**FISCAL IMPACT:**

F.O. INITIALS \_\_\_\_\_

**STAFF RECOMMENDATION:**

Staff recommends approval of the Development and Disposition Agreement and authorize the City Attorney to begin conveyance proceedings.

**MANAGER'S RECOMMENDATION:**

MANAGER'S INITIALS \_\_\_\_\_

**MOTION:**

SECONDED:

AYES:

NAYES:

ABSENT:

APPROVED ( )

DISAPPROVED ( )

REJECTED ( )

DEFERRED ( )

REFERRED TO:

**CITY OF IMPERIAL  
REDEVELOPMENT AGENCY**

**DEVELOPMENT AND DISPOSITION AGREEMENT  
#OPA2009.02**

**Hofer Corporation**

This agreement is hereby entered into this 21<sup>st</sup> day of January 2009 by and between the Imperial Redevelopment Agency, hereinafter referred to as "Agency" and Hofer Corporation hereinafter referred to as "Developer. The Agency and Developer hereby agree as follows:

WITNESSETH

Whereas, Developer locate a new concrete batch plant facility in the City of Imperial; and

Whereas, under California Redevelopment Law, the Agency can enter into public/private agreements to remove blight, improve community appearance, prevent continuing declines in property values, rehabilitate and restore existing commercial revenue generating properties, construct new projects, and revitalize economically depressed areas through new investment within the Imperial Redevelopment Project Area; and

Whereas, it is in the interests of the Agency to participate with the Developer in this project, to effectively implement the Redevelopment Plan for the Imperial Redevelopment Project Area.

**Section 1. Purpose of the Agreement**

The purpose of this Agreement is to implement the Redevelopment Plan for the Imperial Redevelopment Project Area by providing an incentive for the developer to invest new funds within the Project Area through expansion of an existing commercial property located in a blighted area. The rehabilitation of the project site by the Developer pursuant to this agreement, and the fulfillment generally of the agreement are in the vital and best interests of the Imperial Redevelopment Agency, and the health, safety, and general welfare of the City of Imperial residents, and in accord with the public purposes and provisions of applicable Federal, State and local laws and requirements under which the project will be undertaken and assisted.

**Section 2. The Redevelopment Plan**

The Redevelopment Plan for the Project Area was approved by the City Council of the City of Imperial by Ordinance No. 659, which was adopted on June 19, 2002. This Agreement shall be subject to the provisions of the Redevelopment Agency which is incorporated herein and made a part this Agreement.

**Section 3. The Redevelopment Project Area**

The Redevelopment Project Area is located in the City of Imperial, California, the exact boundaries of which are specifically described in the Redevelopment Plan and in an instrument recorded in Book 2131 at page 1726, in the Official Records of the Imperial County Recorder, which instruments are incorporated herein by reference and made a part hereof.

#### **Section 4. The Project Site**

The project site to which this Agreement relates is that portion of the Redevelopment Project Area described in Exhibit A.

#### **Section 5. Parties to the Agreement**

The parties to this Agreement are the Redevelopment Agency of the City of Imperial and Hofer Corporation. The Agency is a public body, corporate and politic, exercising governmental functions and powers, and organized and existing under Chapter 2 of the Community Redevelopment Law of the State of California. The principal office of the Agency is located at 420 South Imperial Avenue, Imperial, California 92251. "Agency", as used in this Agreement, includes the Imperial Redevelopment Agency and any assignee of, or successor to its rights, powers and responsibilities.

The Developer is herein identified as Hofer Corporation. The principal mailing address of the Developer is 5662 Otay Valley Road, San Diego, CA 92154. Whenever the term "Developer" is used herein, such term shall include any approved nominee, assignee, or successors in interest of the Developer.

#### **Section 6. Prohibition Against Changes in Ownership, Management, and Control**

The qualifications and identity of the Developer are of particular concern to the City and the Agency. It is because of those qualifications and identity that the Agency has entered into this Agreement with the Developer. No voluntary or involuntary successor in interest of the Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein.

Except as set forth herein, the Developer shall not, prior to January 1, 2018, assign all or any part of this Agreement or any rights hereunder, without the prior written approval of the Agency. The Agency shall not unreasonably withhold its approval of an assignment provided that: (1) the assignee shall expressly assume the obligations of the Developer pursuant to this Agreement in writing satisfactory to the Agency; (2) the original Developer shall remain fully responsible and liable for the performance of the obligations of the Developer pursuant to this Agreement until the fifth (5<sup>th</sup>) anniversary of the recording of the Notice of Completion for the project, and (3) the assignee is fully capable of performing the duties and discharging the obligation it is assuming.

The Developer shall notify the Agency in writing in five (5) days of any and all changes whatsoever in its identity, business organization, or business location.

All of the terms, covenants, and conditions of this Agreement shall be binding upon and shall inure to the benefit of the Developer and the permitted successors and assigns of the Developer.

#### **Section 7. Representations by the Developer**

The Developer represents and warrants to the Agency as follows:

1. The Developer is a legally established business and in good standing under the laws of the State of California, and has duly authorized, executed and delivered this Agreement and any and all other documents required to be executed and delivered by the Developer, in order to carry out, give effect to, and consummate the transactions contemplated by this Agreement.
2. The Developer does not have any material contingent obligations or any material contractual agreements which could materially affect the ability of the Developer to carry out its obligations hereunder.
3. To the Developer's knowledge, there is no action or proceeding pending or threatened, looking toward the dissolution or liquidation of the Developer, nor to the Developer's knowledge is there any action or proceeding pending or threatened by or against the Developer which could affect the validity and enforceability of the terms of this Agreement in any material respect, or that would materially and adversely affect the ability of the Developer to carry out its obligations hereunder.
4. The project created a minimum of ten (10) new employees in the City of Imperial within one year and up to thirty (30) new employees within five years.

Each of the foregoing items 1 to 4 inclusive, shall be deemed to be an on-going representation and warranty. The Developer shall use reasonable efforts to advise the Agency in writing if there is any material change pertaining to any matters set forth or referenced in the foregoing items 1 to 4 inclusive.

#### **Section 8. Improvement of the Project Site**

The Developer will develop the project site described in Exhibit A in the City of Imperial consistent with the Imperial Redevelopment Master Plan. Improvements shall include, but not limited to clean up of existing site, installation/construction of new concrete batch plant, extension of infrastructure to the project site, fencing, and landscaping.

#### **Section 9. Planning and Zoning Approvals**

The Developer shall comply with all requirements of the City of Imperial General Plan and Zoning Ordinance. In addition, the Developer shall comply with all other applicable City Ordinances and regulations as it relates to the project site. Nothing in this Agreement allows for any implied variance or waiver from any City Ordinance or regulation.

#### **Section 10. Compliance with Uniform Building Code**

All construction undertaken on the project site shall be undertaken in full compliance with all applicable provisions of the Uniform Building Code. A building permit shall be obtained prior to the start of any construction on the site.

#### **Section 11. Participation in the Project by the Agency**

The Agency herein agrees to participate with the Developer by providing the land to the Developer at no cost and up to \$100,000.00 for fencing, landscaping, and equipment.

#### **Section 12. Schedule for Performance**

The Developer shall submit a complete application package for a building permit on the building no later than 60 days after the execution of this Agreement. The Developer shall have completed the project and obtained a Certificate of Occupancy no later than 180 days after the issuance of a building permit. The schedule of performance may be revised where conditions or events beyond the control of the Developer occur. Such events include acts of God such as accidental fire, earthquake, severe weather, or flood. In addition, legitimate delays in completion of the project due to labor strikes, material shortage, or unforeseen site conditions may also justify a revision of the schedule of performance. Any revision of the schedule for performance must be approved in writing by the Agency Executive Director, upon written request of the Developer.

#### **Section 13. Cost of Construction and Site Development**

The cost of improvements shall be borne exclusively by the Developer with funding assistance from the Imperial Redevelopment Agency as outlined in Section 11. Any additional cost shall be the responsibility of the Developer.

#### **Section 14. Agency Approval of Plans and Drawings**

The Agency shall have approval authority for all plans and drawings prepared for rehabilitation of the project site. This includes building plans, site development plans, landscaping plans, and building architectural elevations, including exterior colors and façade materials. The Agency shall review all plans within 30 calendar days, and provide comments to the Developer.

#### **Section 15. Bodily Injury and Property Damage Insurance**

The Developer shall defend, assume all responsibility for, indemnify and hold the Agency and the City of Imperial, their officers, employees, and consultants harmless from all claims or suits for and damages to property and injuries to persons which may be caused by the activities of the Developer on the site. The Developer shall take out and maintain a comprehensive liability insurance policy in the amount of one million dollars (\$1,000,000.00) combined single limit policy, including contractual liability, which shall protect the Developer, the City and the Agency from any and all claims for such damages. The Developer shall provide a certificate of insurance countersigned by an authorized representative of the insurance company on a form of the insurance company setting forth the general provisions of the insurance. The City, the Agency and The Holt Group, Inc. shall be named as additional insureds under the policy. The insurance certificate shall contain a statement of obligation on the part of the insurance company to notify the City and Agency of any material change, cancellation, or termination of coverage at least 30 days prior to the effective date of such material change in coverage, cancellation, or termination. The Developer shall also furnish to the Agency, or cause to be furnished by the contractor, evidence satisfactory to the Agency that the contractor has in place valid workers compensation insurance as required by State Law.



The insurance obligations outlined in this section shall remain in place at all times during construction of the project and for 45 days following the recording of a Certificate of Occupancy and Notice of Completion for the project.

#### **Section 16. Destruction and Restoration**

The Developer covenants and agrees that in case of damage or destruction of the project, project site improvements, on-site building or other improvements, fixtures, and other alterations prior to January 1, 2018, the Developer shall rebuild and restore, repair or replace the project site, on-site improvements, buildings, fixtures and other alterations to the approximate condition of the improvements and building immediately prior to the natural or manmade, accidental or intentional event causing the damage or destruction.

The Developer shall take out and maintain a replacement cost "all-risk" insurance policy in an amount sufficient to rebuild and restore, repair or replace the project improvements, buildings and other improvements, fixtures and alterations located thereon, including upgrades and modifications required by changes in laws or building codes until January 2018. The Developer shall provide a Certificate of Insurance countersigned by an authorized representative of the insurance company on a form of the insurance company setting forth the general provisions of the insurance. The City and the Agency shall be named as additional insureds under the policy. The insurance certificate shall contain a statement of obligation on the part of the insurance company to notify the City and the Agency of any material change, cancellation or termination of coverage at least 30 days prior to the effective date of such material change in coverage, cancellation or termination.

#### **Section 17. Anti-Discrimination During Construction**

The Developer for itself and its successors and assigns agrees that in the construction of the improvements contemplated by this agreement on the site, the Developer will not discriminate, nor allow any discrimination by any contractor or subcontractor, against any employee or job applicant because of sex, age, handicap, color, religion, creed, national origin, marital status, or sexual orientation.

#### **Section 18. Applicable Local, State and Federal Laws**

The Developer shall carry out the project in full compliance with all applicable Federal, State and Local laws, including those relating to labor standards, payment of minimum wages, hours of work and drug free workplace. Before commencement of any construction on the site, the Developer shall pay or cause to be paid to the City and other agencies, applicable building permit fees, school impact fees, and water and sewer connection fees.

#### **Section 19. Rights of Access**

Representatives of the Agency and the City shall have reasonable right of access to the site without charges or fees during the period of construction to determine compliance with the provisions of this Agreement. Such representatives of the Agency and the City shall be those so identified by the executive director of the Agency.

## **Section 20. Indemnification**

The Developer shall indemnify and hold harmless the Agency, the City and its officers, employees, agents, consultants and attorneys from any and all actions, causes of action, claims, demands, costs, attorney's fees, loss of services, expenses, and compensation on account of, or in any way growing out of the developer's performance or non-performance of any section, covenant, or term of this Agreement.

## **Section 21. Use and Maintenance of the Project Site**

The Developer covenants and agrees for itself, its successors, its assigns and every successor in interest, to devote the Site to uses specified in the Redevelopment Plan and to comply with all other provisions and conditions of the Redevelopment Plan for the period of time the Redevelopment Plan is in force and effect.

The Developer shall maintain the project site and the improvements on the site in good condition at all times. The Developer shall ensure that the site is kept free of weeds, debris and waste material at all times. The Developer shall also maintain the landscaping required to be planted in a healthy condition at all times and shall replace any required trees, shrubs, and turf that dies or becomes unhealthy within 30 days. If, at any time, the Developer fails to properly maintain said landscaping and/or fails to replace dead or damaged landscaping within the 30 day period, the Agency, after giving the Developer a written 10 day notice, shall have the right to replace said damaged landscaping at Agency expense and place a lien on the property to recover Agency costs.

## **Section 22. Defaults and Remedies**

Subject to the extension of time for force majeure set forth, failure or delay by the Agency or Developer to perform any term or provision of this Agreement constitutes a default under this Agreement. The party who so fails or delays must immediately commence to cure, correct or remedy such failure or delay, and shall complete such cure, correction or remedy with reasonable diligence.

The injured party shall give written notice of the default to the party in default, specifying the default complained of by the injured party. Except as required to protect against further damages, the injured party may not institute legal proceedings against the party in default until 30 days have elapsed after giving such notice. Delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default. Except as expressly provided for in this Agreement, any failure or delay by either party in asserting any of its rights or remedies as to any default, shall not operate as a waiver of any default or of any such rights or remedies as to any default, or deprive either party of its right to institute and maintain any actions or proceeding which it may deem necessary to protect, assert or enforce any such rights or remedies.

In addition to any other rights or remedies, the Agency may acquire such the Project Site or any interest therein by any lawful means, including eminent domain, for its fair market value, and the Agency may thereafter dispose of the property or interest so acquired in accordance with the Redevelopment Plan.

Notwithstanding any provision herein to the contrary, the rights and remedies of the Agency hereunder shall be subject to the rights and remedies of the Developer's lender to cure any default on the part of the Developer, as well as the other rights of such lender, so long as those rights are in conformance with and meet the intent of this Agreement and those rights are exercised in a timely and diligent manner.

### **Section 23. Applicable Laws**

This Agreement shall be construed and governed by the laws of the State of California.

### **Section 24. Commencement of Legal Actions**

In addition to any other rights or remedies, either party may institute legal action to cure, correct, or remedy any default to recover damages for any default, or to obtain any other remedy consistent with the purposes of this Agreement. Such legal actions shall be instituted in the Superior Court of the County of Imperial, State of California, or in any other appropriate court in the County of Imperial.

In any legal action commenced between the parties hereto concerning the project site, this Agreement, or the rights and duties of either party in relation thereto, the prevailing party in such legal action shall be entitled, in addition to such other relief as may be granted, to recover reasonable attorney's fees and court costs and other non-reimbursable legal expenses, such as expert witness testimony fees.

### **Section 25. Termination by the Developer**

In the event that the Developer is unable to proceed with the project according to the schedule of performance outlined herein, the Developer may request the termination of this Agreement. The Developer shall provide the Agency with written notice outlining the reasons for the requested termination. The Agency, at its own discretion, may choose to terminate this Agreement or enforce the Agreement.

### **Section 26. Termination by the Agency**

The Agency, subject to the notice provisions of Section 21, may terminate this Agreement by giving formal written notice to the Developer, if any of the following events occur:

1. The Developer, or any successor in interest, assigns or attempts to assign this Agreement or any rights therein, to a third party without Agency approval in violation of this Agreement.
2. There is significant change in the financial stability of the Developer as evidenced by the Developer filing for bankruptcy.
3. The Developer fails to construct the project within the approved time or any extension thereof.
4. The Developer fails to comply with any provision of this Agreement or any approved amendments thereto.

## **Section 27. Acceptance of Service Process**

In the event that any legal action is commenced by the Developer against the Agency, service of process on the Agency shall be made by personal service on the Chairman or Executive Director of the Agency, or in such other manner as may be provided by law.

In the event any legal action is commenced by the Agency against the Developer, service of process shall be made personally to the Developer.

## **Section 28. Written Notices**

Any written notices required by or under this Agreement shall be addressed as follows, and sent by first class mail, postage prepaid:

To the Agency: Ms. Marlene D. Best, Executive Director  
Imperial Redevelopment Agency  
420 South Imperial Avenue  
Imperial, CA 92251

To the Developer: Mr. Ernie Hofer  
5662 Otay Valley Road  
San Diego, CA 92154

## **Section 29. Warranty Against Payment of Consideration for Agreement**

The Developer warrants that it has not paid or given, and will not pay or give any third party any monetary consideration for obtaining this Agreement or any benefits or rights outlined therein.

## **Section 30. Non-Liability of Agency Officials and Employees**

No member of the Agency Board, official, employee, consultant, or independent contractor of the Agency or the City shall be personally liable to the Developer or any successor in interest, in the event of a default or breach by the Agency, or for any amount which may become due to the Developer or to its successors, or on any obligations under the terms of this Agreement.

## **Section 31. Inspection of Books and Records**

The Agency staff shall have the right at all reasonable times to inspect the books and records of the Developer pertaining to the project and the project site, as pertinent to the purposes of this Agreement until January 1, 2018. The Developer has the right at all reasonable times to inspect the public records, as provided for by or under California law, of the Agency pertaining to the site, as pertinent to the purposes of this Agreement.

## **Section 32. Agreement to Run with the Land**

The terms, covenants, conditions and restriction of this Agreement shall extend to, and shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns each of the Developer and the Agency.

All of the terms, covenants, conditions and restrictions of this Agreement which do not terminate upon the recording of the Certificate of Completion for the site shall be deemed to be, and shall constitute terms, covenants, conditions, and restrictions running with the land unless otherwise specified. This Agreement shall be binding on any future owners or successors in interest of the project site, and all terms and requirements of this Agreement shall run with the land. This Agreement shall be recorded in the Office of the County Recorder of Imperial County, California.

### **Section 33. Amendments to Agreement**

The Developer and the Agency agree to mutually consider reasonable requests for amendments to this Agreement which may be made by lending institutions, the Agency's or Developer's counsel, or financial consultants, provided said requests are consistent with the intent of this Agreement, and would not substantially alter the basic terms included herein.

### **Section 34. Invalidity of Terms**

It is hereby declared to be the intention of the parties that the sections, paragraphs, sentences, clauses and phrases of this Agreement are severable, and if any phrase, clause, sentence, paragraph or section of this Agreement shall be declared unconstitutional, invalid or unenforceable by a judgment or decree of a court of competent jurisdiction, such unconstitutionality, invalidity, or unenforceability shall not affect any of the remaining clauses, sentences, paragraphs or sections of this Agreement or any approved amendments thereto.

### **Section 35. Entire Agreement, Waivers, and Amendments**

This Agreement shall be executed in three duplicate originals, each of which is deemed to be an original. This Agreement includes ten (10) pages and attachments which constitutes the entire Agreement and understanding of the parties.

This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to any or all part of the site.

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the Agency and Developer, and all amendments hereto must be in writing and signed by the appropriate authorities of the Developer and Agency.

### **Section 36. Time for Acceptance of Agreement by the Agency**

This Agreement, when executed by the Developer to the Agency must be authorized, executed and delivered by the Agency within 30 days after the date of signature by the Developer or this Agreement may be terminated by the Developer upon written notice to the Agency. The date of this agreement shall be the date when the Agreement shall have been signed by the authorized Agency representative.

*(the remainder of this page is intentionally left blank)*

**Section 37. Approval Signatures**

The signatures of the Developer and the Agency outlined below constitute the execution of this Agreement.

IMPERIAL REDEVELOPMENT AGENCY

By:

Date: \_\_\_\_\_

\_\_\_\_\_  
Marlene D. Best, Executive Director

Attest:

Form Approved by Agency Counsel

\_\_\_\_\_  
Debra Jackson  
Recording Secretary

\_\_\_\_\_  
Dennis Morita  
Attorney at Law

Date: \_\_\_\_\_

Date: \_\_\_\_\_

DEVELOPER

By:

Date: \_\_\_\_\_

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

E-4

DATE SUBMITTED 01-15-09  
SUBMITTED BY City Manager  
DATE ACTION REQUIRED 01-21-09

COUNCIL ACTION (x)  
PUBLIC HEARING REQUIRED ( )  
RESOLUTION ( )  
ORDINANCE 1<sup>ST</sup> READING ( )  
ORDINANCE 2<sup>ND</sup> READING ( )  
CITY CLERK'S INITIALS ( )

**IMPERIAL CITY COUNCIL  
AGENDA ITEM**

SUBJECT: DISCUSSION ONLY – ECONOMIC STIMULUS  
PACKAGE/LOBBYING PROJECTS FOR PRESENTATION IN  
WASHINGTON D.C.

BACKGROUND/SUMMARY:

FISCAL IMPACT:

STAFF RECOMMENDATION:

MANAGER'S RECOMMENDATION:

MANAGER'S INITIALS \_\_\_\_\_

MOTION:

SECONDED:  
AYES:  
NAYES:  
ABSENT:

APPROVED ( ) REJECTED ( )  
DISAPPROVED ( ) DEFERRED ( )  
REFERRED TO: